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ADMITTED TO PRACTICE: NY, MA

June 6, 2023

BY EMAIL AND BY FIRST-CLASS MAIL

Shira Perlmutter
Register of Copyrights,
United States Copyright Office
101 Independence Ave., S.E.
Washington, DC 20559-6000

Re: Invalid Copyright Registration for New York Pattern Jury Instructions

Dear Register Perlmutter:

We write on behalf of Public.Resource.Org (“Public Resource”) to bring to your attention an invalid copyright registration issued to the New York State Unified Court System (“NYSUCS”), in the New York Pattern Jury Instructions (“PJI”).¹ Public Resource is a 501(c)(3) non-profit corporation that aims to enhance public access to government information and public law.

As described more fully below, binding precedent—including the United States Supreme Court’s decision in *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020)—makes clear that the PJI is an edict of government that is ineligible for copyright protection in the United States. “[T]he [Copyright] Office may take administrative notice” of the concerns set forth in this letter and “may use [knowledge provided by the public] to question an application that appears to contain or be based upon inaccurate or erroneous information.” See U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 602.4(C) (3d ed. 2021).²

¹ The most recent editions have been registered in the name of the “New York Unified Court Systems” under copyright registration numbers TX0009143865, TX0009115699, and TX0008898543. Copies of these registrations are annexed hereto as Exhibit A.

² In reviewing and ultimately cancelling the copyright registration for *Zarya of the Dawn* (Registration No. # V Au001480196)—a graphic novel created in part using images generated by the Midjourney generative AI program—the Copyright Office took administrative notice of “Midjourney’s public documentation” to better understand “Midjourney and how it works.” Letter from Robert J. Kasunic, Associate Register of Copyrights and Director of the Office of Registration Policy & Practice, to Van Lindberg (Feb. 21, 2023)

Factual and Legal Background

The NYSUCS claims ownership of copyright in the PJI as a work made for hire, authored by the Committee on Pattern Jury Instructions of the Association of Justices of the Supreme Court of the State of New York (“Association of Justices”). The Association of Justices is an incorporated body of judges of the Supreme Court of the State of New York. Among several stated purposes, the Association aims to “create[] [and] promote . . . improvement in the civil and criminal justice systems in the State of New York” and to “increase the usefulness of the judiciary in the improvement of the judicial system.”³

In *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020), the United States Supreme Court held that a work is an uncopyrightable edict of government, regardless of whether it “carries ‘the force of law,’” where “the author of the work is a judge or a legislator” and the work is “produce[d] in the course of [the author’s] judicial or legislative duties.” *Id.* at 1513. *Georgia* is the latest in a long line of precedent holding that “[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which . . . is free for publication to all.” *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (emphasis added) (“[The edicts of government doctrine] extends to whatever work [judges] perform in their capacity as judges.”); *see also id.* at 1507.

The Copyright Office has previously recognized the applicability of the edicts of government doctrine to state civil jury instructions. *See Letter from Literary Division, U.S. Copyright Office, to Jimmy Nguyen, Judicial Council of California* (Nov. 5, 2021) (Copyright Office Correspondence ID: 1-51B3KUC) (refusing to register copyright in the non-binding Judicial Council of California Civil Jury Instructions); *see also U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.6(C)(2)* (3d ed. 2021) (“[The edicts of government doctrine] also applies to any . . . other non-binding explanatory legal materials a judge may create in his [or her] judicial capacity.”) (citations omitted).

In its creation of the PJI, the Association of Justices’ Committee on Pattern Jury Instructions is a body of judges acting in the course of their judicial duties for the Unified Court System. Thus, the Association of Justices cannot be the PJI’s “author” for copyright purposes.

(Correspondence ID: 1-5GB561K), available at: <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>. This process of reconsideration and cancellation, assisted by external facts taken notice of under § 602.4(C) of the Compendium, allowed the Copyright Office to conclude that—much like NYUUCS’s registration of the PJI—“the registration . . . was issued based on inaccurate and incomplete information.” *Id.*

³ Certificate of Incorporation of Association of the Justices of the Supreme Court of the State of New York, Inc., ¶ 3 (Jan. 25, 2013).

Following the Supreme Court’s decision in *Georgia*, Public Resource published the PJI online. NYSUCS sent Public Resource a letter asserting its registered copyright in the PJI and requesting that the PJI be taken down. Public Resource responded with a letter explaining that the PJI is not copyrightable and received no response from NYSUCS.

Public Resource writes now to express concern that, unless the Copyright Office corrects the invalid registration, NYSUCS will continue to use its registered copyright in the PJI to intimidate citizens from lawful reproduction of the New York Pattern Jury Instructions. This would undermine the public’s right of access to government documents which are critical to citizens’ understanding of their rights and the litigation process and which meaningfully shape legal outcomes.

Applying the Edicts of Government Doctrine

In recent years—since the Supreme Court’s *Georgia* decision—the Unified Court System’s applications to register copyright in the PJI have asserted that “[t]he Committee on Pattern Jury Instructions[,] Association of Justices of the Supreme Court of the State of New York is not an arm of the . . . judiciary and does not have the power to make or interpret the law.” *Compare TX0009115699* (2021) and *TX0009143865* (2022) with *TX0008898543* (2020). Recent editions of the PJI have similarly emphasized that the Committee on Pattern Jury instructions “does not make or set the law” and the PJI is “not the official expression of the Unified Court System.” *See* Association of Justices, N.Y. Pattern Jury Instructions: Civil, xxxix (3d ed., vol. 1A 2022). This position is untenable.

First, as the *Georgia* decision makes clear, it is not relevant whether the materials are legally binding. Non-binding materials written by judges acting in the course of their judicial duties are equally covered. *Georgia*, 140 S. Ct. at 1504 (“[N]on-binding, explanatory legal materials are not copyrightable when created *by judges . . .*”). Because judges are “generally empowered to make and interpret the law, their ‘whole work’ is deemed part of the ‘authentic exposition and interpretation of the law’ and must be ‘free for publication to all.’” *Id.* at 1507 (quoting *Banks*, 128 U.S. at 253) (emphasis added).

Moreover, the PJI —written by Unified Court System judges—clearly has a strong *persuasive* role in determining the judicial practice of the Unified Court System. The Second Circuit has described the PJI as “authoritative” for the purposes of drafting jury charges and verdict sheets. *See Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000). More importantly, the Uniform Rules for New York State Trial Courts also explicitly outline how requests for charges from the PJI should be made, conveying the Unified Court System’s endorsement of the PJI and implicitly encouraging its use. *See* Uniform Rules for Trial Courts

(22 NYCRR) § 202.20-h(c). The strong, albeit non-binding, influence the judicially created PJI exerts over judicial practice makes it clear that the PJI *must* be covered by the edicts of government doctrine. *See Georgia*, 140 S. Ct. at 1512 (condemning Georgia’s focus on the materials’ “non-binding and non-authoritative” status to “undersell[] their practical significance” to citizens’ understandings of their “legal rights and duties”).

Second, it strains belief to suggest that the judges of the Unified Court System, who possess the general authority to make and interpret the law, do not act in the scope of their judicial duties in drafting the model jury instructions that they later use—and encourage litigants to use—to guide judicial practice and *make and interpret the law*. The PJI derives a significant portion of its value, and persuasive force, from the fact that it is authored by those with the power and responsibility to apply it in their judicial capacity.

In many states, writing model jury instructions is explicitly incorporated into state judges’ judicial duties. For example, the Judicial Council of California produces non-binding—but heavily endorsed—Civil Jury Instructions deemed ineligible for copyright under the edicts of government doctrine by the Copyright Office. *See Letter from Literary Division, U.S. Copyright Office*, to Jimmy Nguyen, Judicial Council of California (Nov. 5, 2021) (Copyright Office Correspondence ID: 1-51B3KUC). Like the Association of Justices’ Committee on Pattern Jury Instructions, the Judicial Council of California is composed primarily of sitting judges; council members work on a volunteer basis, without additional compensation.⁴ The key difference is that the Judicial Council of California is explicitly situated within California’s judicial branch, whereas the Committee on Pattern Jury Instructions is formally situated within the independently incorporated Association of Judges. The dynamic is otherwise identical: members of the state judiciary draft non-binding, but highly influential model jury instructions claimed as intellectual property of the state’s judicial branch, which employs the drafters in a judicial capacity, to be used by the same judges in said judicial capacity. It is unreasonable and contrary to the Supreme Court’s decision in *Georgia* to allow the New York Unified Court System to claim copyright in jury instructions created by its own judges, which critically shape citizens’ legal outcomes, simply by purporting to interpose a non-profit corporation between itself and its judiciary.

Work Made for Hire

As a final note, the designation of the PJI as a “work made for hire” in NYSUCS’s application for registration undercuts the Unified Court System’s position and raises additional concerns

⁴ See California Courts, *Judicial Council Members*, courts.ca.gov, <https://www.courts.ca.gov/4645.htm> (last visited June 4, 2023).

about the validity of the registration. Under 17 U.S.C. § 101, a work made for hire is defined as either “a work prepared by an employee within the scope of his or her employment” or “a work specially ordered or commissioned” for a limited list of purposes. The former is precluded by the Unified Court System’s characterization of the Association of Justices and its relationship to the judicial branch: in correspondence with Public Resource, the Unified Court System insisted the Association of Justices is “independent of the judicial branch” and that the NYSUCS had “no input on” its “governance, its policies, or any of its committees.”⁵ The latter is similarly precluded: the PJI cannot simultaneously be created independently without input from the NYSUCS *and* be a work made for hire commissioned by the NYSUCS.

Moreover, if there were an express, written work for hire agreement between NYSUCS and the Association of Justices—as required under Section 101 for a commissioned work for hire—the PJI is neither a collective work,⁶ nor a supplementary work,⁷ compilation,⁸ or instructional

⁵ Moreover, the Unified Court System would stretch the imagination to absurd lengths if it claimed that it employs, in an entirely *distinct and non-judicial capacity*, an association of the very judges it employs as the judicial branch of the state, to produce a document that those same employees will be guided by when acting in their judicial capacity.

⁶ Under 17 U.S.C. § 101, a collective work is a “work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” The PJI cannot be a collective work. First, while the Copyright Office approved registration of the 2020 edition of the PJI as a “[u]nit of publication containing collective work(s),” *see* Registration No. TXooo8898543, the individual model jury instructions comprising the PJI are not “separate and independent” works. 17 U.S.C. § 101. They are created in coordination by single committee. Second, they are not, individually, copyright eligible works. As model jury instructions written by state judges acting in their judicial capacity, as explained above, the jury instructions making up the PJI (like the PJI itself) are uncopyrightable edicts of government. *See Georgia*, 140 S. Ct. at 1506. NYUCS cannot transform individually uncopyrightable model jury instructions into a copyright-eligible work-made-for-hire by instructing their creators—judges NYUCS employs in a judicial capacity, whose general authority to make and interpret the law is the source of the instructions’ copyright-ineligibility—to combine them into the PJI.

⁷ The PJI cannot be “a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, . . . bibliographies, appendixes, and indexes.” 17 U.S.C. § 101. Not only is the PJI presented as a standalone resource, caselaw and jury instructions previously crafted by sitting judges are not copyright-eligible “work[s] by another author” that the PJI could supplement. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1506 (2020) (“Under the government edicts doctrine, judges . . . may not be considered the “authors” of the works they produce in the course of their official duties as judges.”).

⁸ The PJI is not a work formed by “collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original

text.⁹ Even if the PJI were eligible for copyright protection (and it is not), it cannot be a work made for hire owned by the NYSUCS.

Conclusion

The Unified Court System and the Association of Justices have persistently obscured the nature of the PJI and the Association of Justices' role in creating the PJI in a manner that frustrates application of the *Georgia* case and the edicts of government doctrine. This action aims to withhold public access to jury instructions written by Unified Court System judges, which fundamentally shape judicial practice and litigants' legal outcomes. Not only is the registered copyright in the PJI technically invalid, as the PJI cannot be considered a work made for hire, such registration flies in the face of the spirit and letter of the Supreme Court's ruling in *Georgia v. Public.Resource.Org, Inc.*. We urge the Copyright Office to reconsider registration of copyright in the New York Pattern Jury Instructions.

Very truly yours,



Christopher T. Bavitz

Enclosure

cc: Robert J. Kasunic (By Email and By First-Class Mail)
Associate Register of Copyrights,
United States Copyright Office

Suzanne Wilson (By Email and By First-Class Mail)
General Counsel and Associate Register of Copyrights,
United States Copyright Office

Hon. Anthony Cannataro (By First-Class Mail)
Acting Chief Judge,
New York State Court of Appeals

work of authorship." 17 U.S.C. § 101. The Association of Justices is *creating* the jury instructions contained in the PJI, not assembling and arranging pre-existing materials.

⁹ The PJI is not "a literary . . . work prepared for publication and with the purpose of use in systematic instructional activities." 17 U.S.C. § 101.

Hon. Joseph A. Zayas (By First-Class Mail)
Chief Administrative Judge,
New York State Unified Court System

Hon. Tamiko Amaker (By First-Class Mail)
Deputy Chief Administrative Judge for Management Support,
New York State Unified Court System

Cindy Martucci-Kiyar (By Email)
New York State Unified Court System

Carl Malamud (By Email)
President,
Public Resource

David Halperin (By Email)
Of Counsel,
Public Resource

Registration Number
TX 8-898-543
Effective Date of Registration:
January 21, 2020
Registration Decision Date:
September 29, 2020

Title _____

Title of Work: New York Pattern Jury Instructions - Civil. Third Edition. Volume 1A, 1B, 2A, 2B and Index & Tables. 2020 Edition.

Completion/Publication _____

Year of Completion: 2019
Date of 1st Publication: December 20, 2019
Nation of 1st Publication: United States

Author _____

- **Author:** New York Unified Court Systems
- Author Created:** Original and revised text and compilation of text
- Work made for hire:** Yes
- Domiciled in:** United States

Copyright Claimant _____

Copyright Claimant: New York Unified Court Systems
25 Beaver Street, New York, NY, 10004, United States

Limitation of copyright claim _____

Material excluded from this claim: Some previously published material, including earlier versions.
Previous registration and year: TX0008711310, 2019
New material included in claim: Original and revised text and compilation of text

Rights and Permissions _____

Organization Name: Copyright Clearance Center
Address: 222 Rosewood Drive
Danvers, MA 01923 United States

Certification

Name: Rebecca Matzek
Date: January 06, 2020

Correspondence: Yes
Copyright Office notes: Regarding basis for registration: Unit of publication containing collective work(s).

Registration Number

TX 9-115-699

Effective Date of Registration:

June 22, 2021

Registration Decision Date:

May 04, 2022

Title _____

Title of Work: New York Pattern Jury Instructions - Civil. Third Edition. Volume 1A, 1B, 2A, 2B and Index & Tables. 2021 Edition.

Completion/Publication _____

Year of Completion: 2020

Date of 1st Publication: December 15, 2020

Nation of 1st Publication: United States

Author _____

• **Author:** Committee on Pattern Jury Instructions Assoc. of Justices of the Supreme Court of the State of NY

Author Created: Original and revised text and compilation of text

Work made for hire: Yes

Domiciled in: United States

Copyright Claimant _____

Copyright Claimant: New York Unified Court Systems
25 Beaver Street, New York, NY, 10004, United States

Transfer statement: By written agreement

Limitation of copyright claim _____

Material excluded from this claim: Some previously published material, including earlier versions.

Previous registration and year: TX0008898543, 2020

New material included in claim: Original and revised text and compilation of text

Rights and Permissions _____

Organization Name: Copyright Clearance Center

Address: 222 Rosewood Drive

Danvers, MA 01923 United States

Certification

Name: Rebecca Matzek
Date: June 14, 2021

Copyright Office notes: Regarding author information: Note to Copyright Office states: "The Committee on Pattern Jury Instructions Association of Justices of the Supreme Court of the State of New York is not an arm of the legislature or judiciary and does not have the power to make or interpret the law."

Regarding limitation of claim: Registration does not extend to U.S. government works or government edicts that have been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials. 17 USC 105; Compendium 313.6(C)(2).

Registration Number

TX 9-143-865

Effective Date of Registration:

March 10, 2022

Registration Decision Date:

July 18, 2022

Title _____

Title of Work: New York Pattern Jury Instructions - Civil. Third Edition. Volume 1A, 1B, 2A, 2B and Index & Tables. 2022 Edition.

Completion/Publication _____

Year of Completion: 2021

Date of 1st Publication: December 14, 2021

Nation of 1st Publication: United States

Author _____

• **Author:** Committee on Pattern Jury Instructions Assoc. of Justices of the Supreme Court of the State of NY

Author Created: Original and revised text and compilation of text

Work made for hire: Yes

Domiciled in: United States

Copyright Claimant _____

Copyright Claimant: New York Unified Court Systems
25 Beaver Street, New York, NY, 10004, United States

Transfer statement: By written agreement

Limitation of copyright claim _____

Material excluded from this claim: Some previously published material, including earlier versions.

Previous registration and year: TX0009115699, 2021

New material included in claim: Original and revised text and compilation of text

Rights and Permissions _____

Organization Name: Copyright Clearance Center

Address: 222 Rosewood Drive

Danvers, MA 01923 United States

Certification

Name: Rebecca Matzek

Date: March 04, 2022

Copyright Office notes: Regarding authorship information and limitation of claim: Registration does not extend to U.S. government works or government edicts that have been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials regardless of whether they have the force of law. 17 U.S.C. 105; Compendium 313.6(C)(2).

Regarding author information: The Committee on Pattern Jury Instructions Association of Justices of the Supreme Court of the State of New York is not an arm of the legislature or judiciary and does not have the power to make or interpret the law.